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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROSHANAK MAHDAVI-POUR, Plaintiff and Respondent, v. CITY OF LOS ANGELES, Defendant and Appellant.	B284003 (Los Angeles County Super. Ct. No. LC095639)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dorothy L. Shubin, Judge. Affirmed.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, Michael M. Walsh, Deupty City Attorney, for Defendant and Appellant.

Carpenter, Zuckerman & Rowley, Gary S. Lewis, John C. Carpenter, for Plaintiff and Respondent.

Plaintiff and respondent Roshanak Mahdavi-Pour sued defendant and appellant City of Los Angeles (the City) after she tripped and fell over an uneven sidewalk. After the close of testimony at a jury trial, the trial court granted the City's motion for non-suit on two causes of action for violation of mandatory duty, under Government Code section 815.6.[1] The jury found in favor of plaintiff on her remaining cause of action, for dangerous condition of public property under section 835. The jury also found plaintiff suffered $520,500 in losses, but was 20 percent at fault.

The City appealed the judgment, arguing the jury's verdict was unfairly prejudiced by evidence and argument offered in support of plaintiff's mandatory duty claims. The City also contends that the judgment on plaintiff's dangerous condition claim must be reversed because there was no substantial evidence the City had notice of the dangerous condition. Plaintiff contends the City has not shown reversible error, and the evidence presented to the jury was sufficient to support the determination that the City had constructive notice of the dangerous condition. We affirm.

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[1] All further statutory references are to the Government Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff's Injury and Claims

In February 2011, plaintiff tripped and fell while walking her dog on a City sidewalk near her home. At the place where she tripped, one section of the sidewalk had been lifted between three and a half to four inches above the adjoining section. Roots from a tree in the parkway between the sidewalk and the road had gradually caused the uplift over many years. Prior to her fall, plaintiff had walked this portion of the sidewalk frequently, and she was aware of the uplift.

Plaintiff filed suit against the City, seeking damages for injuries suffered as a result of her fall. Plaintiff's second amended complaint, filed June 2014, alleged three causes of action against the City. The first cause of action was for dangerous condition of public property, and the next two causes of action alleged the City had breached a mandatory statutory duty to maintain and repair the sidewalks. The trial court overruled the City's demurrer to the mandatory duty causes of action.

Motions in limine

Shortly before trial, the City filed a motion to bifurcate under Code of Civil Procedure section 597, and asking the

court to dismiss the mandatory duty claims. It also filed a motion in limine seeking to prevent plaintiff from introducing any evidence relating to her mandatory duty claims. Plaintiff argued both motions were procedurally improper attempts to convince the trial court to reconsider its earlier decision overruling the City's demurrer to the mandatory duty claims. After hearing argument, the court denied the both motions, reasoning that plaintiff had not identified an affirmative defense warranting bifurcation and the motion in limine was not the proper procedural mechanism to prevent plaintiff from pursuing her mandatory duty claims. The court did not rule out the possibility of a nonsuit motion with respect to those claims, and requested that the parties submit written briefing on the viability of the mandatory duty claims.

The court also heard argument on a different motion in limine filed by the City seeking to exclude evidence relating to constructive notice. The court first sought context on the City's motion, hearing from both plaintiff and the City, and then taking the matter under submission. The record does not reflect the court's ruling during pretrial proceedings,[2] but subsequent evidentiary rulings during trial suggest that the court had decided to permit evidence relevant to the reasonableness of the City's inspection system in the context

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[2] The city asserts in its opening brief that the court granted the motion, but only provides a record citation for the motion itself, not any part of the reporter's transcript reflecting that the court granted the motion.

of constructive notice, but not for the purpose of demonstrating that the City's policies created a mandatory duty to repair the sidewalks.

Evidence presented to jury

Plaintiff entered into evidence multiple items of "inter-departmental correspondence" describing the City's historical and changing approach to sidewalk inspections and repairs. Through those documents and testimony from Brad Avrit, plaintiff's expert witness, and Gary Gsell, a retired street maintenance superintendent from the Bureau of Street Services, plaintiff presented evidence that before 1974, if a street inspector went out to an address, the inspector would walk both sides of the street and cite property owners, who were responsible for repairing damaged sidewalks. In 1974, prompted by available federal funding, the City accepted fiscal responsibility for repairing damage to sidewalks caused by parkway trees. By 1995, the City noted a significant increase in the need for temporary asphalt repairs, and changed its policy to only perform such repairs "at the location of the request." In 2005, the City would make a "reasonable effort" to locate and repair sidewalk defects close to the location of a repair request. A 2009 memorandum described the City's sidewalk problem as follows: "over 40% of the system is estimated to be in disrepair (4,600 miles out of a total of 10,750 miles), exceeding a cost of $1.2 billion."

In 2011, the City had a reactive 311 system, where if someone reported a sidewalk problem, whether by a call to the City's 311 phone line, email, or a letter, the City would send out an inspector and if warranted, schedule a repair. If the supervisor was out on an inspection and saw another uplift nearby, he would schedule that repair as well. Any displacement over three-quarters of an inch would be patched with asphalt. City employees working on sidewalk repair were expected to report any additional defect within 20 feet of the repair. The City had not had a "walking inspection" system for the past 25 years.

Avrit testified about the danger posed by the sidewalk uplift, and opined that it would take years for tree roots to uplift a sidewalk. He had reviewed records showing that the City's street tree division had done work in the area 15 times in the six and a half years before plaintiff's accident. He acknowledged that the street tree division was a different department than the department of street services, which repairs sidewalks. The Department of Public Works was divided into different departments, including the department of street services. In his opinion, the City lacked a reasonable inspection system because City employees working in the street tree division were not trained to report sidewalk damage from tree roots. Asked to describe what he considered a reasonable inspection system, Avrit described a system where someone would walk every sidewalk at least once a year to look for damage, and report any damage observed so that it could be put on a list to get fixed. In

contrast, he described the city's current reactive system as an "ostrich approach," where the city only fixes the problems that are reported by someone, and even when city employees are out fixing a problem, they will not report other problems unless they are within five or ten feet of where they are working.

Hector Banuelos was a superintendent in what was known in 2011 as the Street Tree Division. He testified that tree crews will not generally inspect for road or sidewalk damage while they are responding to service requests such as fallen trees or broken limbs. They would report a sidewalk problem if they were out inspecting a tree, but Banuelos could not provide an example of any instance where such a report was made.

Nonsuit on mandatory duty claims

After testimony, but before final argument, and outside the presence of the jury, the City made an oral motion for nonsuit on plaintiff's mandatory duty claims,[3] and the court

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[3] The nonsuit motion was made while the court was considering arguments on the admissibility of exhibits. On the question of whether the city's internal memoranda were admissible, the city argued the documents were not relevant to the dangerous condition question, but might be relevant to the mandatory duty claims. The court suggested the parties turn to the motions, "because I'll need to tell you where I stand on the mandatory duty." After much prompting from the court, the city stated it was moving for nonsuit.

granted nonsuit on those claims. After dismissing the mandatory duty claims, the court admitted into evidence the City's internal correspondence as relevant to the dangerous condition claim, overruling the City's objection that the documents should not be admitted into evidence because they were only relevant to plaintiff's mandatory duty claims. The court cautioned the parties against referring to the documents as creating any duty based on the City's municipal code.

DISCUSSION

The City makes three key contentions on appeal. It contends there was insufficient evidence to support the jury's determination that the City had notice of the dangerous condition of the sidewalk. It contends that permitting plaintiff to proceed on her mandatory duty claims up through the presentation of evidence resulted in jury confusion and prejudice, improperly leading to a favorable verdict on plaintiff's dangerous condition of public property claim. Related to the claim of jury confusion and prejudice, the City contends the court erred in rejecting three proposed jury instructions that could have mitigated the prejudice. We are not persuaded by any of these arguments.

Applicable law

"Under the California Government Claims Act (Gov. Code, § 810 et seq.), governmental tort liability must be based on statute. 'Except as otherwise provided by statute: [¶] . . . [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.' (Gov. Code, § 815, subd. (a); see *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899.)" (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 179.)

Dangerous condition of public property

"'[S]ection 835 sets out the exclusive conditions under which a public entity is liable for injuries caused by a dangerous condition of public property.' . . . [Citation.]" (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1129 (*Metcalf*).) A plaintiff must establish "that the property was in a dangerous condition at the time of the injury and the public entity had actual or constructive notice of the dangerous condition." (*Montenegro v. City of Bradbury* (2013) 215 Cal.App.4th 924, 929.) In the case before us, plaintiff contends the City had constructive notice of the sidewalk's condition.

Under section 835.2, to prove "constructive notice of a dangerous condition within the meaning of subdivision (b) of

Section 835," a plaintiff must establish "that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. On the issue of due care, admissible evidence includes but is not limited to evidence as to: [¶] (1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property. [¶] (2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition." (§ 835.2, subd. (b); see also *State of California v. Superior Court* (1968) 263 Cal.App.2d 396, 400.)

The definition of constructive notice described in section 835.2 pre-dates the enactment of the Government Tort Claims Act in 1963. (See, e.g., *Gentekos v. City & County of S. F.* (1958) 163 Cal.App.2d 691, 697–698 [a city has "constructive notice of substantial defects which have existed for some time, and which are so conspicuous that a reasonable inspection would have disclosed them."].) The statutory language was intended to continue the

understanding of constructive notice that existed since 1923: "Under the Public Liability Act of 1923, public entities are at times charged with 'constructive notice' of a defect because it would be obvious upon an inspection and because it has existed for a substantial period of time. Subdivision (b) continues these rules. Under subdivision (b), the plaintiff has the burden of proving that the public entity had constructive notice. In addition, the subdivision makes clear that evidence is admissible to show (1) what would constitute a reasonable inspection system, and (2) what inspection system was used by the public entity. The admission of this evidence is necessary so that the issue of whether or not a public entity had constructive notice will turn on whether a reasonable inspection system would have disclosed the existence of the condition." (Sen. Com. on Judiciary, com. on Sen. Bill No. 42 (1963 Reg. Sess.) reprinted at 32 pt. 2 West's Ann. Gov. Code (2012 ed.) foll. § 325.2, p. 190.)

"The questions of whether a dangerous condition could have been discovered by reasonable inspection and whether there was adequate time for preventive measures are properly left to the jury." (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 843.)

Mandatory duty

Government Code section 815.6 permits liability when a public entity's breach of a mandatory statutory duty causes

injury.[4] "Government Code section 815.6 has three elements that must be satisfied to impose public entity liability: (1) a mandatory duty was imposed on the public entity by an enactment; (2) the enactment was designed to protect against the particular kind of injury allegedly suffered; and (3) the breach of the mandatory statutory duty proximately caused the injury." (*B.H. v. County of San Bernardino*, *supra*, 62 Cal.4th at p. 179.)

Plaintiff's second amended complaint alleged the City had a mandatory statutory duty to repair dangerous sidewalk conditions, based on the California Streets and Highways Code, sections 5611 and 5615[5] for one cause of

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[4] "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (Gov. Code, § 815.6.)

[5] "When any portion of the sidewalk is out of repair or pending reconstruction and in condition to endanger persons or property or in condition to interfere with the public convenience in the use of such sidewalk, the superintendent of streets shall notify the owner or person in possession of the property fronting on that portion of such sidewalk so out of repair, to repair the sidewalk." (Sts. & Hy. Code, § 5611.) "If the repair is not commenced and prosecuted to completion with due diligence, as required by the notice, the

action, and based on section 62.104[6] of the Los Angeles Municipal Code for a separate cause of action.

Substantial evidence supports the jury's determination that the City had constructive notice of the sidewalk uplift

We begin with the final contention in the City's opening brief, that the jury's verdict was not supported by substantial evidence because there was insufficient evidence

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superintendent of streets shall forthwith repair the sidewalk." (Sts. & Hy. Code, § 5615.)

[6] At the time of the events in question, section 62.104 of the Los Angeles Municipal Code authorized the Board of Public Works (Board) to notify property owners or occupants when "a sidewalk, driveway or curb constructed on any street shall be out of repair or in need of reconstruction, or in a condition to endanger persons or property passing thereon, or in a condition to interfere with the public convenience in the use thereof," and require the owners to repair the sidewalk, driveway or curb. (Former L.A. Mun. Code, § 62.104, amended by L.A. Ord. No. 146,040, eff. 7/13/74.) The Board also had the power to perform the work and recover the costs as specified in the code. (*Id.* at subds. (c) and (e), amended by L.A. Ord. No. 175,596, eff. 12/7/03.) One exception specified: "Preventive measures and repairs or reconstruction to curbs, driveways or sidewalks required as the result of tree root growth shall be repaired by the Board at no cost to the adjoining property owner." (*Id.* at subd. (e).)

that the City had notice of the sidewalk uplift that caused plaintiff's fall. The argument ignores the substantial evidence to support the jury's finding, as reflected in their response on a special verdict form, that the City had "actual or constructive notice of the dangerous condition for a long enough time to have protected against it."

When, as here, a party contends insufficient evidence supports a jury verdict, we apply the substantial evidence standard of review. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) ""In determining whether a judgment is supported by substantial evidence, we may not confine our consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the trial court. [Citation.] We may not substitute our view of the correct findings for those of the trial court [or jury]; rather, we must accept any reasonable interpretation of the evidence which supports the [factfinder's] decision."' [Citations.]" (*Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 816.)

Here, substantial evidence supported the existence of a dangerous condition over a lengthy period of time. Viewing the record in the light most favorable to the judgment, the sidewalk uplift was approximately four inches—a gap that the City did not contest was dangerous—and given the expert testimony about the rate at which tree roots cause such uplifts to grow, would have been between three and

four inches in size for approximately eight years before plaintiff tripped over it.

Section 835.2, the section explaining what evidence may be used to prove constructive notice, in light of the condition's obvious danger and the at least eight year period it persisted, "expressly recognizes that in determining whether a public entity has constructive notice of a dangerous condition, the jury may consider whether 'the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate . . . to inform the public entity whether the property was safe for [its intended use]' and '[w]hether the public entity maintained and operated such an inspection system with due care and did not discover the condition.'" (*Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 303 (*Nishihama)*; see also *Heskel v. City of San Diego* (2014) 227 Cal.App.4th 313, 317 [evidence relevant to constructive notice includes "whether a reasonably adequate inspection system would have informed the public entity, and whether it maintained and operated such an inspection system with due care"].)

In *Nishihama*, a jury awarded damages to a plaintiff who was injured after stepping into a pothole at a crosswalk. (*Id*. at p. 301.) The city appealed, arguing that because it could not be held liable for ordinary negligence, it was error to permit plaintiff to ask city employees about whether a city employee should have noticed the pothole during a routine inspection, whether an employee would have called for a

repair if it had been noticed, and whether it warranted repair. The city also argued a jury instruction on agency was erroneously given. (*Id*. at pp. 302–303.) The appellate court rejected the city's argument, noting that the evidence and the instruction "were relevant to the question of whether the City had constructive notice of a dangerous condition." (*Id*. at p. 303.) Because evidence relevant to the city's system of inspection and repair was relevant to the question of whether the pothole should have been noticed before plaintiff's accident occurred, plaintiff was entitled to elicit testimony on that topic. Evidence that City employees could have repaired the pothole prior to plaintiff's injury was also relevant, because plaintiff "was required to show that the City had actual or constructive knowledge of the dangerous condition a sufficient time prior to the injury to have taken measures to protect against it." (*Id*. at p. 303.)

In the present case, again drawing all inferences in favor of the judgment, substantial evidence supported the jury's finding that the City had constructive notice of such an obvious hazard because it lacked a reasonably adequate inspection system. The parties presented evidence about the City's current system, which relies on members of the public to report broken sidewalk problems. The jury was also given evidence describing the City's earlier systems of inspection, as well as the timing and reasons for why the scope of sidewalk inspections was reduced over time. Avrit gave his expert opinion that the City's current system was not a reasonably adequate system because it depended on repair

requests as the exclusive method for learning of sidewalk defects. By relying exclusively on repair requests, the evidence indicated that the City did not take advantage of City employees who were already in the area, such as employees trimming trees, to report obvious sidewalk defects they would inevitably observe while working on parkway trees. City records documented some 15 visits by tree services employees to the area where the defect here was located within the six and one-half years prior to the accident (the time during which the uplift was already three inches high, and growing to four inches high). In Avrit's opinion, the City could implement a system that would identify dangerous conditions, with minimal disruption to the City employees who would only need to report the condition to the appropriate division. In addition to employees who cared for parkway trees, Avrit gave the example of City water meter readers being tasked once a year to log in a computer each address that had a dangerous sidewalk.

Under section 835.2, the jury had to decide whether the City had a reasonable inspection system in place. If the jury decided the City's current system was not a reasonable inspection system, it was tasked with the duty of deciding whether a reasonable inspection system would have discovered the dangerous condition. The City argues that plaintiff's expert only provided speculative opinion on wildly improbable or fantastical inspection systems. But the City does not contend it was an abuse of discretion to permit such

testimony. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770, 773; *Cooper v. Takeda Pharmaceuticals America, Inc.* (2015) 239 Cal.App.4th 555, 576 [courts should ensure expert opinions are not speculative or grounded in questionable reasoning].) Avrit's expert testimony, when considered in the context of the evidence about the City's past and current inspection systems, provided substantial evidence to support the jury's determination that the City had constructive notice of the sidewalk defect.

Mandatory duty claims did not unfairly prejudice the jury[7]

We reject the City's contention that argument and evidence presented in support of plaintiff's mandatory duty claims unfairly prejudiced the jury on plaintiff's dangerous condition of public property claim. The court gave the jury proper instructions on the legal requirements for proving a dangerous condition claim, and we are unpersuaded by the city's argument that the jury mistakenly believed the City could be held liable because it had a duty to repair all the sidewalks, or that additional proffered instructions would

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[7] Because we find plaintiff prevails on the merits, we do not address her argument that the City waived the right to appeal any alleged error based on the introduction of evidence at trial relating to plaintiff's mandatory duty claims, because the City delayed filing its motion for nonsuit until the close of evidence. The City could have filed that same motion after plaintiff's opening statement, before the introduction of evidence. (Code Civ. Proc., § 581c, subd. (a).) The City argues filing for non-suit was "effectively foreclosed" at that time, as it would have been duplicative of its failed demurrer. However, the reporter's transcript shows that while the court was skeptical about its authority to foreclose the mandatory duty claims by a motion in limine or a motion to bifurcate—the two procedural vehicles attempted by the City—the court was not precluding a motion for nonsuit, which would have been the proper vehicle to challenge the claims.

have mitigated any confusion on the part of the jury. We also reject the City's claim that the cumulative effect of plaintiff's evidence and arguments on plaintiff's invalid mandatory duty claims, which were ultimately dismissed, supports reversal.

Evidence and argument on mandatory duty claims did not cause unfair prejudice

Only after devoting a substantial portion of its opening brief to demonstrating why plaintiff's mandatory duty claims were not actionable does the City lay out the examples of argument and evidence that it contends confused the jury into mistakenly believing that the City had a duty to repair all sidewalks. Plaintiff counters that much of the evidence and argument related to both her mandatory duty and dangerous condition claims, and therefore would have been permissible even if the mandatory duty claims had been dismissed before trial.

We agree with plaintiff that the evidence and testimony about internal correspondence regarding the budget for the Department of Street Services, the estimated extent of damaged sidewalks within the City, and the cost of repairing such damage, are all relevant to the question of whether the City had a reasonably adequate inspection system, whether it maintained and operated that system with due care, and whether a reasonably adequate inspection system would have disclosed the dangerous

condition of the sidewalk that caused plaintiff's injuries. (§ 835.2, subd. (b).)

To the extent there were references during argument or testimony to whether the City had a "duty to repair" the sidewalks, any confusion regarding that question was reasonably addressed by the jury instructions the parties agreed upon after the court had granted non-suit on the mandatory duty claims. The jury was instructed that they were to follow the jury instructions given to them, not anything different stated by the attorneys, and also that statements by the attorneys were not evidence. (CACI Nos. 5000, 5002.) The jury instructions clearly articulated the elements required for liability based on a dangerous condition for public property, and there was nothing in the instructions that would have supported an assumption by the jury that the City was under a mandatory duty to repair damaged sidewalks.

No instructional error

We find no error in the court's refusal to include instructions on explaining there was no mandatory duty, that the City was not an insurer of people using public property, or that the fact of an accident is insufficient to show a dangerous condition. In addition, even if it was error to refuse such instructions, appellant has not shown prejudice.

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*.) A court may refuse a proposed instruction if other instructions given adequately cover the legal point. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1189, fn. 11; *Olive v. General Nutrition Centers, Inc.* (2018) 30 Cal.App.5th 804, 815.) Even if a court erroneously refuses to give a requested instruction, the appellant must demonstrate that the refusal was prejudicial error, meaning "'it seems probable' that the error 'prejudicially affected the verdict.' [Citations.]" (*Soule, supra,* 8 Cal.4th at p. 580; see also *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685.) "[W]hen deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled. [Fn. omitted.]" (*Soule, supra,* at pp. 580–581.)

The parties generally agreed on the jury instructions to be given. The court would give instructions from CACI on dangerous condition of public property claims. The court instructed the jury on the elements for a cause of action for dangerous condition on public property (CACI No. 1100), issue of control (CACI No. 1101), the definition of a dangerous condition (CACI No. 1102), the notice requirement (CACI No. 1103), and the role of a reasonable

inspection system (CACI No. 1104). The court also gave instructions on the City's affirmative defense that it was not liable because it acted reasonably. (CACI No. 1112.)

The City requested some additional instructions, including BAJI No. 11.54, explaining that a public entity is not an insurer required to protect against any possibility of injury; and a special instruction on section 830.5 that the fact an accident occurred is not in and of itself evidence that public property was in a dangerous condition. The judge rejected both requests, finding the CACI instructions adequate. In rejecting the City's request to add BAJI No. 11.54, the court stated it was not inclined to mix BAJI and CACI, and a CACI instruction on dangerous condition was already included. On the point of the City wanting an instruction that it was not an insurer of the people who use its property, the court noted the City could make that argument in its closing. In rejecting the proposed instruction that the happening of an accident is not evidence by itself that the condition was dangerous, the court stated the proposed instruction was argumentative and not necessary.

The City cannot demonstrate prejudicial error based on the refusal of any of the proposed instructions, because the jury was properly instructed on the elements of a dangerous condition claim, and plaintiff made no argument that would imply that the City was an insurer. In addition, with uncontradicted evidence that the sidewalk had a four-inch uplift, it was unnecessary to add an instruction that the

happening of an accident is not evidence that a condition was dangerous. The city's own witness, Gsell, testified that anything over three-quarters of an inch would warrant a repair, and the City would apply an asphalt patch.

Finally, after plaintiff's closing argument, the City sought an instruction that the City has no mandatory duty to repair the sidewalks. The City argued that even though the mandatory duty causes of action had been dismissed, statements made by counsel during closing argument implied that the City had assumed responsibility for fixing the entire sidewalk network. Plaintiff responded that the argument was directed at establishing that because the City was aware of the scope of the sidewalk disrepair problem and did not have a reasonable inspection system, the City was responsible for not fixing the particular dangerous condition that caused plaintiff to fall. It was not that the City was responsible for fixing the entire sidewalk network. The court agreed that nothing in plaintiff's closing argument touched on the statutes that formed the basis for plaintiff's mandatory duty claims, and so refused the proposed instruction. Again, nothing in the City's briefing convinces us that the trial court erred by refusing an instruction relating to claims the court had already dismissed.

No cumulative error

The City argues that permitting argument and evidence on the mandatory duty claims created a

"cumulative effect" that deprived the City of a fair trial focused on plaintiff's dangerous condition claim. However, we have examined each of the City's contentions on appeal and have found them to be without merit. Having concluded that there was substantial evidence to support the jury's determination that the city had constructive notice of the sidewalk uplift, and finding no prejudicial error in the court's decision to deny the City's requests for additional jury instructions, there is no basis for reversal.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to plaintiff and respondent Roshanak Mahdavi-Pour.

MOOR, J.

We concur:

RUBIN, P. J.

BAKER, J.